

10/15/01

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Paper No. 13
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Stocksystem.com, Inc.

Serial No. 75/592,357

Thomas C. Saitta, P.A. for Stocksystem.com, Inc.

Tracy Cross, Trademark Examining Attorney, Law Office 103
(Michael Hamilton, Managing Attorney).

Before Quinn, Hairston and Rogers, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

Stocksystem.com, Inc. has appealed from the Trademark
Examining Attorney's final refusal to register POSITION
COST AVERAGING for "computer programs for automatic
investment management in the field of personal finance
recorded on discs; computer software for automatic
investment management in the field of personal finance that
may be downloaded from a global computer network."¹

¹ Serial No. 75/592,357 filed November 19, 1998, alleging dates
of first use of July 18, 1998.

Registration has been refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground that applicant's mark is merely descriptive of the identified goods.²

Both applicant and the Examining Attorney have filed briefs on the case, but no oral hearing was requested.

Applicant contends that the mark does not directly convey information about its computer programs, but instead simply suggests some sort of investment system because it sounds similar to "dollar cost averaging," which is a well known strategy of investing. Further, applicant argues that the Examining Attorney has failed to establish that the mark is merely descriptive because there is no evidence of record that competitors use the phrase "Position Cost Averaging" in connection with their computer programs and there is no dictionary entry for the phrase. Finally, applicant argues that while each individual term in its mark has a specific meaning, the combined mark is "nonsensical" and has no meaning in the financial field.

² We note that the Examining Attorney, as an alternative basis, for the initial refusal asserted that the mark was deceptively misdescriptive. The Examining Attorney did not pursue this ground and, thus, we consider it withdrawn.

The Examining Attorney, however, maintains that the mark POSITION COST AVERAGING describes a significant feature of applicant's goods, that is, applicant's computer software enables an investor to trade around a core position in a stock. In support of the refusal, the Examining Attorney made of record, inter alia, the following definitions:

position: investor's stake in a particular security or market. Dictionary of Finance and Investment Terms (3d ed. 1991); and

averaging: adding to a holding of particular securities or commodities when the price falls, in order to reduce the average cost of the whole holding. Averaging in consists of buying at various price levels in order to build up a substantial holding of securities or commodities over a period. Averaging out is the opposite process, of selling a large holding at various price levels over a long period. A Dictionary of Finance and Banking (2d ed. 1997).

In addition, the Examining Attorney submitted pages downloaded from applicant's web site.

It is well settled that a term is considered to be merely descriptive of goods, within the meaning of Section 2(e)(1) of the Trademark Act, if it immediately describes an ingredient, quality, characteristic or feature thereof or if it directly conveys information regarding the nature,

function, purpose or use of the goods. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or idea about them. Moreover, whether a term is merely descriptive is determined not in the abstract but in relation to the goods for which registration is sought, the context in which the term or phrase is being used on or in connection with those goods, and the possible significance that the term or phrase is likely to have to the average purchaser of the goods because of the manner in which it is used. See In re Bright-Crest, Ltd., 204 USPQ 591 (TTAB 1979).

At applicant's web site, the "theory" behind its computer software is characterized as follows:

The **Position Cost Averaging™** theory, based on mathematics, captures stock volatility and uses it to the investor's advantage. It signals the action by giving the exact price, and number of shares, to buy or sell creating systematic profits for an investor.

Small gains are methodically taken as prices are rising and additional shares are accumulated when prices are low. The purpose of this incremental adjustment in the amount of stock holdings, is to determine the level of equity based on the price action of the equity itself. **(Truly revolutionary)**

The method can best be described as trading around a "core position" in a stock.
[emphasis and underlining in original]

After consideration of the record, we find that the applied-for mark is merely descriptive of the primary function of applicant's computer software which is to enable an investor to maintain a particular position or "level of equity" in a stock, through programmed buying and selling. When investors encounter the mark POSITION COST AVERAGING, especially as used in the context of the web page referenced above where applicant indicates that the "[POSITION COST AVERAGING] method can best be described as trading around a 'core position' in a stock", we have no doubt that the mark immediately conveys to them information about the primary feature or function of applicant's software, namely, that the software enables investors to maintain their core position or level of equity in a stock, through programmed buying and selling. See *In re Polo International Inc.*, 51 USPQ2d 1061 (TTAB 1999) [The mark DOC-CONTROL for computer software for document management is merely descriptive thereof since it immediately conveys

information about a significant feature of such goods, namely, that the software will assist in the management or control of documents.].

Accordingly, applicant's mark, when applied to applicant's goods, is merely descriptive of them. The fact that applicant is apparently the first (and/or only) entity to use the term POSITION COST AVERAGING for computer software is not dispositive, where, as here, the term unquestionably projects a merely descriptive connotation. That is, the absence of third-party uses of the term does not, as contended by applicant, serve to raise a presumption of registrability. See *In re Tekdyne Inc.*, 33 USPQ2d 1949, 1953 (TTAB 1994) and cases cited therein. Neither are we persuaded to reach a different result in this case because the term does not appear in a dictionary.

Finally, we find unpersuasive applicant's argument that the combined term POSITION COST AVERAGING is "nonsensical." The individual words which comprise applicant's mark have descriptive significance with respect to applicant's computer software and the combination results in a mark which is merely descriptive. As applicant acknowledges, the term POSITION COST AVERAGING is similar in structure to the phrase "dollar cost averaging," a phrase which has descriptive significance in the

financial field. Just as investors understand the meaning of dollar cost averaging, they would understand the meaning of POSITION COST AVERAGING as used in connection with applicant's computer software.

Decision: The refusal to register under Section 2(e)(1) of the Trademark Act is affirmed.